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BATU MALAY THANDY v. SAULINARDI & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: B-02-2982-12-2012]
15 OCTOBER 2014

C ***LEGAL PROFESSION:*** *Disciplinary proceedings – Disciplinary Committee Whether Diciplinary Board bound to adhere to findings and recomendations made by Disciplinary Committee – Whether Disciplinary Board bound to provide reasons for its decision – Whether decision of Disciplinary Board valid – Legal Profession Act 1976, s. 103D(3)*

D ***LEGAL PROFESSION:*** *Disciplinary proceedings – Show cause proceedings – Failure of complainant to attend hearings before Disciplinary Committee – Whether serious procedural flaw – Whether complainant failed to prove complaint beyond reasonable doubt*

E ***LEGAL PROFESSION:*** *Misconduct – Acting in a manner unbefitting as an advocate and solicitor – Advancement of loans – Whether advocate and solicitor advanced loan to complainant – Whether advocate and solicitor guilty of misconduct*

F The appellant was an advocate and solicitor of the High Court of Malaya. The first respondent ('complainant') lodged a complaint against the appellant to the Disciplinary Board ('DB') that the appellant had charged 50% interest on the personal loan taken by the complainant from the appellant. Therefore the DB requested the appellant to give a written explanation on the said complaint. In the appellant's written explanation, the appellant stated *inter alia* that the appellant has acted as counsel for the complainant in a motor vehicle accident suit at Klang Sessions Court in 2006 where the insurance G company offered the complainant RM95,000 to settle the matter. The complainant agreed to pay the appellant's fees and disbursement of RM25,000, friendly loans advanced to the complainant for the sum of RM43,280 and the sum of RM1,250 being the sales tax. The balance sum of RM25,470 was paid to the complainant. Following the written explanation, the DB appointed the Disciplinary Committee ('DC') to H investigate and submit a report to the DB on the complaint. After its investigation, the DC recommended that the complaint against the appellant be dismissed. The DC noted that the complainant was not present at the hearing to assist the DC to reach its findings. The DC also noted that the complainant took the loan from one Malliga a/p Simanchalam and one I Thilagavathi a/p Simanchalam who were staffs at the appellant's office. The DB disagreed with the finding and recommendation of the DC and issued a

notice to appear against the appellant to make his representation on why liability should not be found against the appellant. The DB, upon hearing the appellant pursuant to s. 103D(3) and 103D(4) of the Legal Profession Act 1976 ('the Act'), ordered the appellant to pay a penalty of RM20,000 payable to the Discipline Fund within one month from the date of the order, failing which the appellant would be suspended from practice as an advocate and solicitor pursuant to s. 103(1) of the Act until payment of the penalty. The appellant submitted that the DB had failed to provide reasons for its decision in imposing the fine on the appellant and since the punishment imposed on the appellant affected his livelihood, the DB was bound to provide reasons for its decision. On the contrary, the second respondent submitted that the DB was exercising the power expressly conferred upon it by statute and as such it should not be challenged. Also, s. 103D of the Act does not impose any duty on the DB to provide grounds for its decision. The second respondent further added that there was an act of misconduct pursuant to Bar Council Ruling 14.26 by the appellant when he had directly or indirectly been involved in the lending of money to the complainant. The appellant, however, submitted that based on acknowledgements receipts, the loan given to the complainant was not advanced by the appellant but from the appellant's staffs. This fact was confirmed by the report prepared by the DC. The High Court Judge found that the DB was not bound to adhere to or follow the findings and recommendations made by the DC. The High Court Judge also found that the failure of the DB to give reasons for its decision was not a ground to render the decision of the DB void and that the High Court was not at liberty to impose on the DB to provide reasons for its decision. Hence, the appeal.

Held (allowing appeal; setting aside decision of High Court)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The first respondent's failure to be present at the disciplinary hearing before the DC to state his case and to be cross-examined by the appellant was a proper ground for the complaint to be dismissed by the DC. The DB, based on the report prepared by the DC, ought to have agreed with the findings made by the DC. The absence of the first respondent before the DC was a serious procedural flaw and as such the complainant had failed to prove his complaint beyond reasonable doubt. (paras 14-15)

(2) The DB was not bound to follow the findings and recommendations made by the DC by virtue of s. 103D(3) of the Act and there was no general duty to give reasons for its decision as there was no statutory obligation to do so. However, s. 103D(1) had been subsequently amended *vide* the Legal Profession (Amendment) Act 2012 and was brought into force on 3 June 2014 wherein the words 'and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason

for the rejection' were inserted after the words 'recommendation of the Disciplinary Committee'. As such, the issue is now put to rest. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah seorang peguambela dan peguamcara Mahkamah Tinggi Malaya. Responden pertama ('pengadu') telah membuat aduan terhadap perayu kepada Lembaga Tatatertib ('LT') bahawa perayu telah mengenakan faedah sebanyak 50% ke atas pinjaman peribadi yang diambil oleh pengadu daripada perayu. Oleh itu, LT telah meminta perayu untuk memberikan penjelasan bertulis terhadap aduan tersebut. Dalam penjelasan bertulis, perayu telah menyatakan antara lain bahawa perayu telah bertindak sebagai peguam pengadu dalam satu tindakan kes kemalangan kenderaan motor di Mahkamah Sesyen Klang pada tahun 2006 di mana syarikat insurans telah menawarkan RM95,000 kepada responden pertama untuk menyelesaikan tindakan tersebut. Pengadu telah bersetuju untuk membayar fi perayu dan kos perbelanjaan sebanyak RM25,000, pinjaman persahabatan yang diberikan kepada pengadu sebanyak RM43,280 dan jumlah RM1,250 sebagai cukai jualan. Baki sebanyak RM25,470 dibayar kepada pengadu. Berikut penjelasan bertulis, LT telah melantik Jawatankuasa Tatatertib ('JT') untuk menyiasat dan mengemukakan laporan kepada LT berkenaan aduan tersebut. Selepas siasatan, JT telah mengesyorkan supaya aduan terhadap perayu ditolak. JT telah mengambil perhatian bahawa pengadu tidak hadir semasa pendengaran tersebut untuk membantu JT mencapai keputusan. JT juga menyatakan bahawa pengadu telah mengambil pinjaman daripada Malliga a/p Simanchalam dan Thilagavathi a/p Simanchalam yang merupakan kakitangan di pejabat perayu. LT tidak bersetuju dengan dapatan dan pengesyoran JT dan mengeluarkan notis terhadap perayu untuk hadir dan membuat representasi mengenai mengapa liabiliti tidak boleh dikenakan terhadap perayu. LT, selepas mendengar perayu menurut s. 103D(3) dan 103D(4) Akta Profesion Undang-Undang 1976 ('Akta'), telah mengarahkan perayu membayar denda sebanyak RM20,000 yang perlu dibayar kepada Kumpulan Wang Tatatertib dalam tempoh sebulan dari tarikh perintah, jika gagal, perayu akan digantung daripada amalan sebagai peguambela dan peguamcara menurut s. 103(1) Akta sehingga pembayaran penalti dibuat. Perayu berhujah bahawa LT telah gagal untuk memberikan sebarang alasan dalam mencapai keputusannya dan oleh kerana hukuman yang dikenakan ke atas perayu menjejaskan mata pencarian perayu, LT harus memberikan penjelasan mengenai keputusannya. Sebaliknya, responden kedua menghujahkan bahawa LT menggunakan kuasa yang diberikan kepadanya oleh statut dan oleh itu ia tidak boleh dicabar. Juga, s. 103D Akta tidak mengenakan apa-apa kewajipan ke atas LT untuk memberi penjelasan bagi keputusannya. Responden kedua selanjutnya menghujahkan bahawa terdapat perbuatan salah laku oleh perayu menurut Arahan-Arahan Majlis Peguam

14.26 apabila perayu secara langsung atau tidak langsung terlibat dalam pemberian pinjaman wang kepada pengadu. Perayu, bagaimanapun, berhujah bahawa berdasarkan resit akuterima, pinjaman yang diberikan kepada pengadu tidak didahulukan oleh perayu tetapi diberikan oleh kakitangan perayu. Fakta ini telah disahkan oleh laporan yang disediakan oleh JT. Hakim Mahkamah Tinggi mendapati LT tidak terikat untuk mematuhi atau mengikuti penemuan dan cadangan yang dibuat oleh JT. Hakim Mahkamah Tinggi juga mendapati bahawa kegagalan LT untuk memberikan penjelasan mengenai keputusannya bukanlah alasan untuk menjadikan keputusan LT tidak sah dan bahawa Mahkamah Tinggi tidak mempunyai kebebasan untuk memaksa LT memberi penjelasan mengenai keputusanya. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

(1) Kegagalan responden pertama untuk hadir semasa pendengaran tatatertib di hadapan JT untuk menyatakan kesnya dan untuk disoal balas oleh perayu adalah alasan yang sesuai untuk yang mewajarkan aduan tersebut ditolak oleh JT. LT, berdasarkan laporan yang disediakan oleh JT, sepatutnya bersetuju dengan keputusan yang dibuat oleh JT. Ketiadaan responden pertama di hadapan JT merupakan kecacatan prosedur yang serius dan pengadu gagal membuktikan aduannya melampaui keraguan munasabah.

(2) LT tidak terikat untuk mengikut penemuan dan cadangan yang dibuat oleh JT menurut s. 103D(3) Akta dan tidak ada kewajipan am untuk memberikan penjelasan mengenai keputusannya kerana tidak ada kewajipan berkanun untuk berbuat demikian. Walau bagaimanapun, s. 103D(1) kemudiannya telah dipinda melalui Akta Profesion Undang-Undang (Pindaan) 2012 dan dikuatkuasakan pada 3 Jun 2014 di mana perkataan 'dan jika Lembaga Tatatertib menolak dapatan atau pengesyoran Jawatankuasa Tatatertib, Lembaga Tatatertib hendaklah merekodkan sebab bagi penolakan tersebut' dimasukkan selepas perkataan 'Pengesyoran Jawatankuasa Tatatertib'. Oleh itu, isu ini telah pun diselesaikan.

Case(s) referred to:

Chan Yiew Hock v. Koh Hong Toong & Anor; Majlis Peguam Malaysia (Intervener) [2011] 4 CLJ 160 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Hoo Lin Coln v. Wong Weng Woh & Anor [2006] 3 CLJ 939 HC ***(refd)***

Keith Sellar v. Lee Kwang And Tennakoon v. Lee Kwang [1980] 1 LNS 36 FC ***(foll)***

A *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC* ***(refd)***
Stefan v. General Medical Council (Medical Act 1983) [1999] 1 WLR 1293 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 103D(1), (3), (4)

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For the appellant - D Kalai; M/s Kalai & Partners
For the 2nd respondent - Arthur Wang Ming Way (Nurufarhina Ab Rahim with him); M/s Arthur Wang, Lian & Assocs

[Appeal from High Court, Shah Alam; Originating Motion No: 25-48-03-2012]

C *Reported by Sandra Gabriel*

JUDGMENT

Umi Kalthum Abdul Majid JCA:

D **[1]** This is an appeal against the decision of the High Court dated 26 November 2012 dismissing the appellant's appeal against the decision of the Disciplinary Board ("DB") dated 20 January 2012, in which the appellant was ordered to pay the penalty of twenty thousand ringgit (RM20,000) payable to the discipline fund within one (1) month from the
E date of the order, failing which the appellant shall be suspended pursuant to s. 103(1) of the Legal Profession Act 1976 ("the Act") from practice as an advocate and solicitor until payment of the penalty ("the order").

Brief Facts

F **[2]** The brief facts of the case are as follows:

2.1 The appellant is an advocate and solicitor of the High Court of Malaya and practising under the name Tetuan Batu Malay and Associates;

G 2.2 The complainant/first respondent lodged a complaint against the appellant to the DB *via* a letter dated 29 June 2010. The contents of the letter of complaint in brief stated that the appellant had charged 50% interest on the personal loan taken by the complainant from the appellant. The appellant had also threatened the complainant and the appellant's clerk had forced the complainant to
H put his thumbprint on a document;

2.3 On 29 September 2010, the DB requested the appellant to give written explanation on the complaint by the complainant;

2.4 The appellant in his reply, by a letter dated 1 November 2010
I (p. 67, Jilid II, Bahagian C), stated the following:

2.4.1 The appellant acted for the complainant in respect of a motor vehicle accident on 18 May 2004 and a civil suit was filed at Klang Sessions Court *vide* action No. 53-70-2006;

2.4.2 After several postponements and negotiations, the insurance company offered RM95,000 to settle the matter;

2.4.3 The complainant accepted this offer and consent judgment was recorded on 12 March 2010;

2.4.4 Thereafter, the appellant's firm received the cheques from the insurance company and the complainant was called to the appellant's office;

2.4.5 The complainant agreed to pay the appellant's fees and disbursement of RM25,000, friendly loans advanced to the complainant for the sum of RM43,280 and the sum of RM1,250 being the sales tax. The balance sum of RM25,470 was paid to the complainant. The complainant had discharged the appellant from further obligations from this case;

2.4.6 The appellant had settled the matter as agreed by the complainant and there was no basis for the complainant's complaint;

2.4.7 In this case the complainant had benefited from the appellant's generosity in helping him to overcome his financial difficulties, incurring medical bills and monthly expenses;

2.5 The DB appointed the Disciplinary Committee ("DC") to investigate and submit a report to the DB on the complaint. After its investigation the DC on 4 August 2011 recommended that the complaint against the appellant be dismissed. The DC was unable to conclude that the appellant had a case to answer and the complaint against the appellant was not established by the complainant. The complainant was not present at the hearing to assist the DC to reach its findings. The DC also noted that the complainant took the loan from Malliga a/p Simanchalam and Thilagavathi a/p Simanchalam;

2.6 The DB disagreed with the finding and recommendation of the DC and issued a notice to appear against the appellant to make his representation on why liability should not be found against the appellant on the complaint;

2.7 On 20 January 2012, the DB, upon hearing the appellant pursuant to s. 103D(3) and s. 103D(4) of the Act, ordered the appellant to pay the penalty in accordance with the order. The appellant filed the originating motion appealing against this decision to the High Court.

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High Court Decision

[3] The learned High Court Judge found that the DB was not bound to adhere to or follow the findings and recommendations made by the DC. In this regard, the court referred to s. 103D of the Legal Profession Act 1976 which provides:

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> **Consideration by the Disciplinary Board of the report of the Disciplinary Committee**
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> 103D. (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.
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> (2) The Disciplinary Board may in appropriate cases impose a greater punishment than that recommended by the Disciplinary Committee.
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> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.
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> … .

[4] The learned High Court Judge also found that the failure of the DB to give reasons for its decision was not a ground to render the decision of the DB void. The learned judge found that in the absence of statutory provisions, the court was not at liberty to impose on the DB to provide reasons for its decision.

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The Appeal

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[5] Before us, learned counsel for the appellant submitted that the loan given to the first respondent was not advanced by the appellant. Reference was made to pp. 109 to 136 of the appeal record in Part C. It can be seen from the acknowledgement receipts that the loan taken by the first respondent was from one Malliga a/p Simanchalam. It was submitted that Malliga a/p Simanchalam is the appellant's staff at his office. This fact was confirmed by the report prepared by the DC dated 4 August 2011.

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[6] In the same report it was stated that the complainant was not present at the hearing before the DC and no evidence was recorded except from the record of complaint. In its conclusion, the DC found that, as the complaint against the appellant could not be established, it recommended that the complaint against the appellant be dismissed.

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[7] The fact that the complainant was not present during the hearing before the DC had deprived the appellant of the opportunity to cross-examine the complainant. The appellant referred to the case of *Hoo Lin Coln v. Wong Weng Woh & Anor* [2006] 3 CLJ 939; [2007] 1 MLJ 56.

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[8] The appellant further submitted that the DB had failed to provide reasons for its decision on 20 January 2012 in imposing the fine on the appellant. The appellant submitted that since the punishment imposed on the appellant affected his livelihood, the DB must give reasons for its decision. In support, counsel cited the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481.

[9] The second respondent's counsel submitted that the DB was exercising the power expressly conferred upon it by statute and as such it should not be challenged. Section 103D of the Act does not impose any duty on the DB to provide grounds for its decision. In *Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam Malaysia (Intervener)* [2011] 4 CLJ 160 (HC) it was held that:

> As alluded earlier, the statutory framework of s. 103D expressly allows the DB to disagree with the recommendations of the DC and to impose a more severe sentence as long as the Appellant is notified and is given an opportunity to be heard. In any event there is no absolute duty for a decision maker to give reasons unless it is provided by the statute.

[10] Learned counsel for the second respondent cited the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 FC where Edgar Joseph Jr FCJ (as he then was) cited with approval and endorsed the principles enunciated by the Privy Council in *Stefan v. General Medical Council (Medical Act 1983)* [1999] 1 WLR 1293 (unreported at that point in time but reported in the Times of London, 8 March 1999) at p. 122, paras c-d:

> The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R. v. Royal Borough of Kensington and Chelsea, Ex p. Grillo* [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg. v. Secretary of State for the Home Department, Ex p. Doody* [1994] 1 AC 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions …

[11] The second respondent further added that there was an act of misconduct by the appellant when he had directly or indirectly been involved in the lending of money to the first respondent. The appellant was in breach of Bar Council Ruling 14.26 which states that:

> It is also conduct unbefitting of an advocate and solicitor to engage or be involved, whether directly or indirectly, in the business of money lending.

A **Our Decision**

[12] From the facts of this case, we found that the first respondent had agreed to the offer made by the insurance company to settle his accident claim. The first respondent then directed the appellant to record a consent judgment and agreed to accept the RM95,000 from the insurance company. B From this sum, the first respondent had agreed to deduct RM25,000 as payment for the appellant for professional fees and disbursements (see p. 85, A.R. Jilid II, Bahagian C). The first respondent had also agreed to further deduct RM43,280, being payment of friendly loan taken by the first respondent from Malliga a/p Simanchalam and Thilagavathi a/p C Simanchalam (see p. 89, A.R. Jilid II, Bahagian C), and the sum of RM1,250 for sales tax (see p. 90 A.R. Jilid II, Bahagian C). Lastly, the first respondent had received the balance of RM25,470 from the appellant (see p. 88, A.R. Jilid II, Bahagian C) and the first respondent had acknowledged that he has no further claims against the appellant after receiving this payment from the D appellant's firm (see p. 86, A.R. Jilid II, Bahagian C). These facts could be seen *vide* letters referred to and signed by the first respondent dated 11 May 2010.

[13] Despite all these letters of acknowledgement by the first respondent, the first respondent had lodged a complaint against the appellant on 29 June E 2010 stating that the appellant had charged 50% interest on the personal loan taken from the appellant, the appellant threatened the first respondent and the appellant's clerk had forced the first respondent to put his thumb-print on a document. The first respondent had also lodged a police report on 29 June 2010 reporting the same complaint against the appellant. And yet the first F respondent had failed to attend the hearings before the DC on 28 April 2011, 20 May 2011, 24 June 2011 and 4 March 2011. No reasons were provided by the first respondent to explain his absence before the DC.

[14] We found that the first respondent's failure to attend/be present at the disciplinary hearing before the DC to state his case and to be able to be cross- G examined by the appellant was a proper ground for his complaint to be dismissed by the DC. Having done this, the DB, based on the report prepared by the DC, ought to have agreed with the findings made by the DC.

[15] We agreed with the submission by the learned counsel for the appellant that the absence of the first respondent before the DC was a serious H procedural flaw and as such the first respondent had failed to prove his complaint beyond reasonable doubt.

[16] In *Keith Sellar v. Lee Kwang And Tennakoon v. Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 (FC), at p. 194, Hashim Yeop Sani J (as he then was), delivering the judgement of the Federal Court, stated: I

The second question is what burden of proof did the Disciplinary Committee apply in arriving at its findings. Looking at the grounds given in its statement of findings, the Disciplinary Committee although it made very firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.

First, what is the standard of proof required in such a proceeding? Very recently this court in *Au Kong Weng v. The Bar Committee, State of Pahang* dealt with the same question and accepted the standard set by *Bhandari*'s case. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving the element of *deceit* or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.

The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgement of this court in *Au Kong Weng*'s case, the Chief Justice said:

> It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct …

[17] We were of the view that the learned High Court Judge had failed to properly appreciate the facts as alluded to by us and as tendered by the appellant. If he had done so he would have found, as we did, that the first respondent had failed to prove his complaint beyond a reasonable doubt. On the issue of burden of proof, we disagreed with the second respondent's submission that the standard of proof has not been provided for statutorily. This court is bound by the decision of the Federal Court in *Keith Sellar (supra)* and we subscribed to it.

[18] We agreed with the decision of the learned High Court Judge that the DB was not bound to follow the findings and recommendations made by the DC by virtue of s. 103D(3) of the Act and there was no general duty to give reasons for its decision as there was no statutory obligation to do so. Whilst we say this, we noted that s. 103D(1) had been subsequently amended *vide* the Legal Profession (Amendment) Act 2012 (Act A1444) and brought into force on 3 June 2014 *vide* P.U.(B) 262/2014 wherein the words "and if the disciplinary board rejects the finding or recommendation of the disciplinary committee, the disciplinary board shall record the reason for the rejection" were inserted after the words "recommendation of the disciplinary committee". So this issue is now put to rest.

A **[19]** We, however, allowed this appeal for the reasons stated above. We allowed the appellant's originating summons in prayers (a) and (b) and set aside the decision of the High Court. We made no order as to costs.

Deposit was refunded.

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